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IN THE

Supreme Court of The United States

JUNE TERM 1966

No. ~~1303~~ 201

PECK IRON & METAL COMPANY,
INCORPORATED
AND
5.658 ACRES, MORE OR LESS OF LAND
IN THE CITY OF CHESAPEAKE, VIRGINIA
Petitioner,

v.

COLONIAL PIPELINE COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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Printed by TEAGLE & LITTLE, INC., Norfolk, Va.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your petitioner, Peck Iron & Metal Company Incorporated prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia.

OPINIONS BELOW

There was no written opinion of the Circuit Court of Chesapeake but an oral opinion was given which was incorporated in the courts order (Appendix A). The opinion rendered by the Supreme Court of Appeals of Virginia is reported in 206 VA. 771 and 146 S.E. 2d 169 (also Appendix A).

JURISDICTION

The judgment of the Supreme Court of Virginia was pronounced January 17, 1966 and a petition for rehearing was denied on March 7, 1966. The jurisdiction of this court is invoked under 28 USCA 1257 (3).

STATEMENT OF CASE

This case originated with the filing of condemnation proceeding by the respondents against property owned by the petitioners.

On August 21, 1963 Colonial Pipeline filed its petition for condemnation (R-2) and amended it on September 13, 1963. On October 9, 1963 the case was heard on its merits and evidence taken ore tenus upon the jurisdictional question (R-31-47). The Circuit Court overruled petitioner's jurisdictional question (R-56) and ruled that the respondents had the right of eminent domain.

Colonial is a corporation existing under the laws of Delaware and Virginia. All stock of Colonial is owned by nine oil companies namely, Texas, Incorporated; Cities Service Company; Gulf Oil Corporation; American Oil; Phillips Petroleum Company; Sinclair Pipeline Company; Socony Mobile Oil Incorporated;

Pure Oil Company and Continental Oil Company (R-40).

Colonial's operations in Virginia are interstate and not intrastate (R-43). It has filed tariffs with the Interstate Commerce Commission and is a common carrier within the scope of Section 1 of 49 USCA (Interstate Commerce Act) (R-40, 43).

Charles McDaniel, treasurer and assistant secretary of Colonial, testified, that he could not say whether or not the petitioner would be allowed to utilize the facilities (R-42, 43). Raymond Gottlieb, assistant to the president of the petitioner, testified that they were advised by the agents of Colonial that use of the line by anyone else would be impossible (R-47). McDaniel also testified that the only benefit the people of Virginia would have would be an uninterrupted source of supply.

However the record is void of any evidence that the existing means of transporting petroleum products into Virginia or in that area of Virginia directly involved in this suit, are inadequate to meet current or future requirements. Indeed, the record is silent on all questions of supply and demand. Nor is there evidence as to the economic effect with Colonials pipeline will have on existing means of transporting petroleum products. Moreover there is not even the suggestion that any citizens of Virginia or anywhere in the United States will receive any economic benefit in purchasing petroleum products shipped by Colonial.

When asked why Colonial was incorporated in Virginia McDaniel answered "as I was advised by our attorney, it was for the purpose of joining the

public service Corporation and to attain the right of eminent domain and to construct the pipeline through the state of Virginia." (R-36).

QUESTIONS PRESENTED

1. Does the Courts opinion violate the petitioner's right guaranteed under the 14th amendment to the Constitution of the United States?

2. What if any control is Colonial subject to by the state or the Federal Government?

3. Does the evidence and law support the courts ruling?

ARGUMENT

The reason for Colonial to incorporate in Virginia was to obtain the right of eminent domain (R-36). In the other states which Colonial passes through, Virginia is the only state Colonial incorporated other than its original state of incorporation. A foreign corporation cannot obtain the powers of eminent domain in Virginia. Colonial incorporated on September 25, 1962 in Virginia, and merged sixteen days later with the Delaware Corporation. It is also surprising to note that Colonial does not state it is a public service corporation anywhere else except in Virginia and this we conclude was to circumvent the Virginia Law in obtaining the right of eminent domain.

The Supreme court of appeals of Virginia in its opinion stated that "when such rights of way cannot be obtained by agreement they must be acquired by eminent domain." We disagree with the Court on this statement, especially when Colonial has passed through

other states with its pipeline without having the right of eminent domain. i:e State of Maryland and other jurisdictions.

In its opinion the Court is concerned that there be an "uninterrupted supply of petroleum products" but there is nothing in the record to indicate that we do not now have an uninterrupted supply of petroleum products to our area.

Colonial has introduced no evidence to show that it will be *required* to supply the facilities to provide an uninterrupted supply in the future. Would the Court reach the same conclusion if the pipeline was for the shipment of orange juice or any other commodity, other than coal, under section 56.1 of Code of Virginia, 1950 as amended.

As for public use, the record is void of any showing that the public will have any access to the input or output facilities along the pipeline. Since no evidence was introduced to show that these facilities are owned by Colonial, as opposed to one of the private companies owning Colonial, these facilities are not under the control of Colonial. In the record and the argument before this court it was conceded by Colonial that no input facilities were located in Virginia and we are dealing not with any intra-state transportation. Therefore, we contend that although Colonial states that the line is available for public use, in reality it can never be, since both the input and output facilities are not controlled by Colonial, but by private companies.

The Court stated that the shippers have requested this type of transportation for their products, but

neglected to state that the shippers, Colonial and receivers are, all one of the same.

The Court failed to recognize and apply the ruling in *Boyd* v. *Ritter Lumber Co.* 119 Va. 348, 89 S.E. 273, LRA 1917A in that

> "Neither mere public convenience nor mere public welfare will justify the exercise of the right of eminent domain.***especially since the capacity for service is of necessity limited and cannot extend to the general public and therefore, the service is a matter of grace and not of right."

The Court's impression that Colonial is regulated by the Interstate Commerce Commission as regards to rates and services is in error. The tarrifs that were filed by Colonial were *voluntary* on their part and were only to misrepresent their position as to the regulatory powers of the Interstate Commerce Commission. In a similar matter the Supreme Court of The United States ruled in *United States* v. *Champlin* 341 US 290, that petroleum products pipelines do not have to file rates since they only carry products in interstate commerce from refineries to points of distribution, and "obviously no one can have any interest . . . that would call for regulation of the pipeline." The Court also indicated that the Interstate Commerce Commission does not have any regulatory powers over petroleum product pipelines.

Since Colonial has conceded that the State Corporation Commission of Virginia does not have any regulatory powers over Colonial and the Champlin case indicates that the Interstate Commerce Commission also

cannot regulate Colonial, who then can regulate, control, or require Colonial to serve the public?

We contend that the petitioner has been denied due process under the Fourteenth Amendment to the Constitution of the United States.

The State may not constitutionally condemn private property if the primary purpose of the condemnation is transfer in the property to private use. *Randolph* v. *Wilmington Housing Authority of Delaware,* 139 A2d 466.

We have always contended that any condemnation by Colonial under the Statutes of Virginia, is a violation of the petitioner's rights guaranteed it under the Constitution of Virginia and the Constitution of the United States specifically the Fourteenth Amendment.

The taking of a man's property for private use of another, even with just compensation is violative of provisions of constitution Maryland Declaration of Rights that no man ought to be deprived of his life, liberty or property but by law of the land is violation of due process. *Riden* v. *Philadelphia B. & W. Railroad Company* 35 A2d 99, 182 Maryland 336.

The record is clear and without contradiction that the use of this pipeline will be for private companies, who are the owners of said pipeline, and that they (the owners) will benefit from the construction and use of said line.

Since the earliest cases, the Supreme Court has held consistently that there is a judicial review to determine whether the taking is for a public use or

benefit. *Shoemaker* v. *United States* 174 U. S. 282, 13 S. Ct 361.

We therefore conclude that this Court erred in sustaining the lower court's decision and that such rulings violated the petitioner's rights as guaranteed under the Fourteenth Amendment of the Constitution of the United States.

Therefore petitioner respectfully requests that a Writ of Certiorari issue to the Supreme Court of Appeals of Virginia.

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of Counsel

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Chesapeake, Virginia

CERTIFICATE OF SERVICE

I certify that three (3) copies of the foregoing Writ of Certiorari were mailed, postage prepaid, to Ralph H. Ferrell, Jr., Hunton, Williams, Gay, Powell and Gibson, Electric Building, Richmond, Virginia, counsel for Colonial Pipeline, this 9 day of June, 1966.

APPENDIX

APPENDIX A

ORDER OVERRULING JURISDICTIONAL OBJECTIONS AND SUMMONING COMMISSIONERS

It appearing to the Court that the Petitioner, Colonial Pipeline Company, has duly filed its Petition to acquire by condemnation, certain rights, privileges and easements of right of way, over, upon and across certain pieces or parcels of land situated in the City of Chesapeake, Virginia, for the use of the Petitioner in the construction, maintenance, inspection, operation, repair, replacement, change of size and removal of a pipe line for the transportation of petroleum products as a common carrier for the public, all of which are more particularly described in said Petition and Exhibits filed herein; the defendant having filed a special plea and motion to dismiss, and its answer and grounds of defense, objecting to the jurisdiction of the Court;

This cause came on this day to be heard upon the Petition, Special Plea and Answer, & Grounds of defense and also exhibits filed therein, and upon evidence taken *ore tenus,* and was argued by counsel.

The Court being of the opinion that the objections filed by the defendant should be overruled for the reason that the property and rights proposed to be taken are necessary for the use and purposes of petitioner and are for public uses, and that the petitioner has the power of eminent domain and authority to condemn the property and rights proposed to be taken that the court is not without jurisdiction that the said petitioner has obtained a charter from the State Corporation Peck Iron & Metal Co., Inc., et al. v. Colonial Pipeline Co.

Page 37] Commission of Virginia as a public service corporation, and has complied with all the statutes made and provided;

On consideration Whereof, it is ADJUDGED, ORDERED and DECREED that the aforsaid objections of the said defendant to the jurisdiction of the Court be, and are hereby overruled to which action of the Court the said defendant, by counsel, objected and excepted.

Whereupon the petitioner, by counsel, moved the Court to summon nine (9) disinterested freeholders, residents of the City of Chesapeake, Virginia, as provided by Section 25-46.2 of the Code of Virginia, as amended.

And it further appearing to the Court that the property and rights proposed to be taken are necessary for the purposes of the Company in serving the public and that Section 26-46.5 of the Code of Virginia, 1950, as amended, has been compiled with, the Court doth

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Enter this: Oct. 9th 1963

MAJOR M. HILLARD
Judge

RICHMOND

PECK IRON & METAL COMPANY, INCORPORATED, ETC.

v.

COLONIAL PIPELINE COMPANY

January 17, 1966.

Record No. 5937.

EGGLESTON, C. J., delivered the opinion of the court.

Colonial Pipeline Company filed in the court below its amended petition seeking to condemn certain easements for the construction and maintenance of a pipeline for the transportation of petroleum products as a common carrier over the land of Peck Iron & Metal Company, Incorporated, in the city of Chesapeake. The petition alleged that Colonial is a "Virginia public service corporation" whose business is the transportation of petroleum products as a common carrier for the public; that the easements sought to be condemned are necessary for its use in serving the public, and that it is authorized by Code, § 56-49 as amended (Repl. Vol. 1959; Supp. 1964), to acquire them by eminent domain.

Peck filed a special plea, answer and grounds of defense, denying that Colonial is a public service corporation vested with the power of eminent domain and that the easements are sought for a public use. Moreover, it alleged that since Colonial had not obtained from the State Corporation Commission a certificate of public convenience and necessity, the Circuit Court of the city of Chesapeake was without jurisdiction of the proceeding.

After hearing the evidence ore tenus the lower court entered an order overruling Peck's jurisdictional objections and holding that the easements proposed to be taken are necessary for the use and purposes of the petitioner, that they are for a public use, and that the petitioner has the power to acquire them by eminent domain. The order further directed the summoning of commissioners for the trial of the issue of just compensation due to Peck. On the same day the court entered an order granting Colonial the right of immediate entry on the property upon the payment of the sum of $10,500 into court. The commissioners determined that $1,500 was due Peck for the value of its property taken and $4,000 for damages to the residue. Over Peck's objection an order was entered confirming this report. We granted Peck an appeal.

In its assignments of error Peck challenges the holding of the lower court (1) that the General Assembly has delegated to Colonial the power of eminent domain; (2) that the taking of these easements across Peck's land is for a public use; (3) that the jurisdiction of the court to entertain this proceeding was not conditioned upon Colonial's obtaining from the State Corporation Commission a certificate of public convenience and necessity.

The pertinent facts are not in dispute. Colonial is a domestic corporation of both Virginia and Delaware. It was chartered and organized as a public service corporation under the laws of the State of Virginia and its powers and purposes in this State are thus stated in its charter:

"In Virginia, to construct, own and operate pipe-

lines for the transportation of crude petroleum, and the products or by-products thereof, as a public service corporation and as a common carrier; and, insofar as permitted by the law of Virginia, to carry on the objects and purposes specified in each of the foregoing clauses of this article. * * *"

Colonial carries refined petroleum products through its pipelines from input points in Texas, Louisiana and Mississippi to Linden, New Jersey, and to intermediate points in thirteen other States and the District of Columbia. It serves eleven locations in Virginia, including the city of Chesapeake. It does not own the products which are carried through its lines but receives and carries those of any shipper which meet its requirements and the regulations of the Interstate Commerce Commission. Colonial's operations are subject to the provisions of the Interstate Commerce Act (49 U.S.C., §§ 1-26), under which it is required to operate as a common carrier. It has filed with the Interstate Commerce Commission a schedule of tariffs which establishes the rates and terms under which it is required to serve as a common carrier the locations along its lines.

The principal questions presented by this appeal are: (1) has Colonial been delegated the power of eminent domain, and (2) is the taking of these easements over Peck's land for a public use?

[1] Peck's position is that Colonial is not vested with the power of eminent domain; that under Code, § 56-49 as amended (Repl. Vol. 1959; Supp. 1964), under which Colonial claims, that right is intended to apply, and indeed constitutionally can only apply, to those public service corporations whose facilities are

devoted to a public use; that there is no showing that Colonial's facilities are so devoted, and no showing of a public necessity for the taking of private property for its purposes. Moreover, Peck says, there is no required legislative control of the purported public use of Colonial's facilities. Finally, Peck says, Colonial's right to exercise the power of eminent domain in the present proceeding was conditioned upon its obtaining from the State Corporation Commission a certificate of public convenience and necessity under Code, § 56-265.2 (Repl. Vol. 1959), which was not done.

The position of Colonial is that it is a public service corporation and as such has been delegated the right of eminent domain under § 56-49 as amended, that the exercise of that right in this case is for a public use, that its pipeline serves the publice as a common carrier of petroleum products, that there is a public need for such pipeline which cannot be met except by the exercise of the right of eminent domain, and that the exercise of that right is adequately guarded and controlled by legislative authority. Colonial denies that its right to exercise the power of eminent domain in the present case is conditioned upon its obtaining a certificate of public convenience and necessity.

We agree with the position of Colonial. As has been said, that company was chartered and organized as a public service corporation. In accord with Code, § 13.1-50 (Repl. Vol. 1964), its charter states its purpose to conduct a single public service business, namely, "to construct, own and operate pipelines for the transportation of crude petroleum, and the products or by-products thereof, as a public service corporation and as a common carrier." Code, § 56-1 (Repl.

Vol. 1959), specifically includes pipeline companies within the definition of public service corporations. Clearly, then, by the terms of its charter and the relevant statutes, Colonial is a Virginia public service corporation.

Public service corporations authorized to conduct a public service business in Virginia have been delegated the right to acquire property by eminent domain under Code, § 56-49, as amended by Acts of 1962, ch. 222, p. 332. The pertinent portion of this section reads:

"In addition to the powers conferred by Title 13.1, each public service corporation of this State organized to conduct a public service business * * * shall have the power:

"(2) To acquire by the exercise of the right of eminent domain any lands * * * necessary for its use in serving the public, * * *."

The critical inquiry is whether the taking of these easements by Colonial is necessary for its use in serving the public, that is, whether the taking is for a public use.

[2] These constitutional limitations on the delegation of the power of eminent domain have been fixed by our former decisions: (1) the taking must be for a public use; private property cannot be taken for private use; (2) the use must be needful for the public; and (3) the rights of the public to use the facilities must be adequately protected. 6 Mich. Jur., Eminent Domain, § 16, p. 701 *ff.*; *Id.*, § 19, p. 705 *ff.*; *Id.*, § 20, p. 707; *Id.*, § 21, p. 708; *Id.*, § 22, p. 708;

Jeter v. *Vinton-Roanoke Water Co.*, 114 Va. 769, 76 S. E. 921, Ann. Cas. 1914C, p. 1029; *Boyd* v. *Ritter Lumber Co.*, 119 Va. 348, 89 S. E. 273, L.R.A. 1917A, 94; *Light* v. *City of Danville*, 168 Va. 181, 190 S. E. 276.

[3] In our opinion, the delegation of the power of eminent domain to Colonial meets these requirements and the taking of these easements over Peck's land is for a public use.

In *Dismal Swamp R. Co.* v. *Roper Lumber Co.*, 114 Va. 537, 546, 77 S. E. 598, we pointed out that, "'The character of the use, whether public or private, is determined by the extent of the right by the public to its use, and not by the extent to which that right is, or may be, exercised. If it is a public way in fact, it is not material that but few persons will enjoy it. * * *'" Or, as was said in *Light* v. *City of Danville, supra,* 168 Va. at 209, 190 S. E. at 287, "The right of the public to receive and enjoy the benefit of the use is the determining factor whether the use is public or private."

Colonial's charter provides that it is a "public service corporation" whose services and facilities are available to all the public. Under the express terms of that instrument it operates "as a common carrier," and can only operate in that manner. As has been said, all persons desiring to ship petroleum products by Colonial's facilities and meeting its requirements and the regulations of the Interstate Commerce Commission will be permitted to do so. Thus the right of the public to use its facilities is guaranteed by its charter, the statutes of this State and the Interstate Commerce Act.

[4] The record before us shows that there is a public need for the services provided by Colonial's pipeline. It is engaged in the transportation of highly used commodities, the economical and efficient transportation of which is obviously in the public interest. There is evidence that shippers have requested this type of transportation. By its tariff filed with the Interstate Commerce Commission, Colonial established that it provides services as a common carrier for all shippers of these commondities in thirteen States and the District of Columbia, from the Gulf of Mexico to the New York harbor area. It is also shown that at all times the public in the area served by Colonial's pipelines, through these facilities, will be guaranteed an uninterrupted supply of petroleum products. Obviously, such a pipeline company must have rights of way from the source of supply to the places of consumption. Where such rights of way cannot be obtained by agreement they must be acquired by eminent domain.

[5] It further appears that the public use of Colonial's facilities is adequately guarded and protected by the laws of this State. Section 156(b) of the Constitution of Virginia vests in the State Corporation Commission "the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; * * *." This constitutional provision is implemented by Code, § 56-6 (Repl. Vol. 1959), which empowers the State Corporation Commission, among other things, "to compel any public service corporation to observe and perform any public duty im-

posed upon public service corporations by the laws of this Commonwealth."

Code, § 56-103, authorizes the State Corporation Commission upon the complaint of any person made to it of any unjust discrimination in carrying freight which comes from, or goes beyond, the boundaries of the State by any transportation company, to investigate such complaint and if the same be sustained to bring it to the attention of the Interstate Commerce Commission for redress in accordance with the provisions of the Act of Congress establishing the Interstate Commerce Commission.

Additional regulatory measures applicable to pipeline companies were enacted at the 1964 session of the General Assembly. By Chapter 523, p. 807, Code § 56-259 (Repl. Vol. 1959), was amended to specify what provisions must be included, and § 56-260.1 was added to specify certain provisions which may not be included, in contract for easements for pipeline "transmitting petroleum products" across lands in this State. Code, § 58-588 (Repl. Vol. 1959), was amended to provide for the assessment of taxes on such companies. (Acts of 1964, ch. § 217, p. 286). *Colonial Pipeline Company* v. *Commonwealth,* 206 Va. 517, 145 S. E. 2d 277 (decided November 29, 1965).

On the whole, we agree with the lower court that the power of eminent domain has been lawfully delegated to Colonial, that the taking of the easements over Peck's land is for a public use, and that such easements may be acquired in the present eminent domain proceedings.

[6] We also agree with the lower court that Colonial's exercise of the right of eminent domain in the present instance is not conditioned upon its obtaining from the State Corporation Commission a certificate of public convenience and necessity under § 56-265.2. This section provides:

"It shall be unlawful for any public utility to construct, enlarge or acquire, by lease or otherwise, any facilities for use in public utility service, except except ordinary extension or improvements in the usual course of business with the territory in which it is lawfully authorized to operate, without first having obtained a certificate from the Commission that the public convenience and necessity require the exercise of such right or privilege. Such certificate shall be issued by the Commission only after formal or informal hearing and after due notice to interested parties."

The definition of the "public utility" to which the section applies is thus defined in § 56-265.1 (b) of the Code:

"'*Public utility*' means any company which owns or operates facilities within the Commonwealth of Virginia for the generation, transmission or distribution of electric energy for sale, for the production, transmission, or distribution, otherwise than in enclosed portable containers, of natural or manufactured gas for sale for heat, light or power, or for the furnishing of telephone service, sewerage facilities or water. Provided that the term 'public utility' shall not include any company furnishing sewerage facilities or water to less than fifty customers."

Clearly, Colonial is not within this statutory definition because in this State it will not and cannot generate, transmit or distribute any of the things, or perform any of the services, therein stated. Under the terms of its charter its powers in this State are limited "to construct, own and operate pipelines for the transportation of crude petroleum, and the products or by-products thereof, as a public service corporation and as a common carrier." All of the evidence before us confirms this as the only purpose for which the company is chartered in Virginia and for which the easements across Peck's land are to be taken.

We find no error in the rulings of the lower court and the judgments is

Affirmed.